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BOARD OF GOVERNANCE
INFORMAL ISSUE PAPER

Streamlined Sales and Use Tax Agreement (SSUTA)

Proposal 5 – Motion to Amend Section 312, Multiple Points of Use (MPU), to add Subsection (E)

I. Issue

Should the Board of Governance grant authority to its representative to vote on the motion to amend SSUTA Section 312 to add subsection (E), as proposed by Mr. Stephen Kranz of Washington D. C.?

Should the Board of Governance vote to amend Section 312 to add subsection (E) to provide rules for transactions in which the purchaser does not provide the seller a MPU exemption certificate? (Exhibit 1 provides the language of Section 312, including the proposed revision. Exhibit 2 provides the motion.)

II. Staff Recommendation

Staff recommends the Board of Governance authorize its representative to vote on the motion to amend SSUTA Section 312.

Staff also recommends the Board of Governance vote “no” on the motion to amend Section 312 to add subsection (E).

III. Background

SSUTA Section 312 provides that a business purchaser that does not hold a direct payment permit shall issue a MPU certificate to the seller when purchasing digital goods, services, or electronically delivered computer software if the purchaser knows at the time of purchase that the digital goods, services, or electronically delivered computer software will be concurrently available for use in more than one jurisdiction. However, this section does not explicitly state what actions should be taken when a MPU certificate is not issued.

The motion to amend Section 312 to add subsection (E) is intended to provide authority for the seller to accept delivery information from the purchaser when a MPU certificate is not issued. This would provide the information necessary for the seller to source the sale. The motion to amend Section 312 is also intended to

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Amend Section 312 to add Subsection (E)

provide authority for relief of the sellers' liability for the sales tax or the obligation for the collection of the use tax when the purchaser does not issue a MPU certificate or provide other necessary information.

Under the provisions of proposed subsection (E)(1), when a MPU certificate is not delivered to the seller, the seller may use written delivery information obtained from the purchaser, which will support any reasonable but consistent, uniform method of collecting and remitting the tax. The seller may also collect tax and source the sale as provided by Section 310 (A). Under proposed subsection (E)(2), in the absence of information from the purchaser, the seller is generally relieved of any obligation to collect or remit tax on the sale. The purchaser is solely responsible for the applicable tax as long as there is no bad faith on the part of the seller.

IV. Summary

Adding subsection (E)(1) to SSUTA Section 312 to allow sellers to use delivery information provided by the purchaser when a MPU certificate is not issued would generally not conflict with California's current policies and procedures. However, adding subsection (E)(2) to Section 312 to shift the liability for the tax to the purchaser when a MPU certificate or delivery information is not provided would create additional tax liability and collection issues for California.

Although California does not tax intangible transfers of products, the proposed amendment would nonetheless be inconsistent with California's current policies and procedures. California's tax laws do not provide a shift of tax liability from the California retailer to the purchaser when the purchaser does not issue an exemption certificate. Nor does California provide the seller the option of not remitting and/or collecting sales or use tax when the purchaser does not issue an exemption certificate.

For the reasons stated above, staff recommends a "no" vote on the motion to amend Section 312.

Prepared by Lynda Cardwell, Sales and Use Tax Department
Current as of March 29, 2005

Amend Section 312 to add Subsection (E)

Section 312: MULTIPLE POINTS OF USE

Notwithstanding the provisions of Section 310, a business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of a digital good, computer software delivered electronically, or a service that the digital good, computer software delivered electronically, or service will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase a form disclosing this fact ("Multiple Points of Use or MPU" Exemption Form).

- A. Upon receipt of the MPU Exemption Form, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis.
- B. A purchaser delivering the MPU Exemption Form may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale.
- C. The MPU Exemption Form will remain in effect for all future sales by the seller to the purchaser (except as to the subsequent sale's specific apportionment that is governed by the principle of subsection (B) and the facts existing at the time of the sale) until it is revoked in writing.
- D. A holder of a direct pay permit shall not be required to deliver a MPU Exemption Form to the seller. A direct pay permit holder shall follow the provisions of subsection (B) in apportioning the tax due on a digital good or a service that will be concurrently available for use in more than one jurisdiction.

E. If an MPU Exemption Form is not delivered to the seller by the purchaser, the seller:

1) may use written information obtained from the purchaser at the time of consummation of the sale which will support any reasonable but consistent and uniform method to collect and remit the applicable tax, or may collect the tax according to Section 310(A);

2) in the absence of information from the purchaser and in the absence of the seller's bad faith, is relieved of any obligation to collect or remit tax on that transaction. The purchaser is solely responsible for the tax.

AMENDMENT # 5 – OFFERED BY STEPHEN KRANZ, WASHINGTON, D.C.**Motion to amend Section 312 to add a new subsection E as follows.**

E. If an MPU Exemption Form is not delivered to the seller by the purchaser, the seller:

- 1) may use written information obtained from the purchaser at the time of consummation of the sale which will support any reasonable but consistent and uniform method to collect and remit the applicable tax, or may collect the tax according to Section 310(A);
- 2) in the absence of information from the purchaser and in the absence of the seller's bad faith, is relieved of any obligation to collect or remit tax on that transaction. The purchaser is solely responsible for the tax.

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STREAMLINED SALES TAX PROJECT**SOURCING COMPUTER SOFTWARE AND RELATED SERVICES**

(Draft for Discussion only - December 31, 2004)

Background

Section 312 of the Agreement requires a business purchaser of a digital good, services or electronically delivered computer software to deliver to the seller a Multiple Points of Use Exemption Form ("MPU") when the purchaser knows at the time of the sale that the digital good, service or electronically delivered software will be available for use concurrently in more than one jurisdiction. Upon receipt of the MPU, the seller is relieved of any obligation to collect sales or use tax on the transaction and the buyer is charged with responsibility for allocating the digital good, services or software among the various jurisdictions where it will be used and remitting the corresponding amount of tax.

Industry representatives have expressed concerns with the provisions of Section 312 with respect to sales of software and related services. The industry proposes two amendments to the sourcing rules in Section 312. First, industry believes that the rules should apply to all software transactions, regardless of the method of delivery. Second, industry believes that the Agreement should include a rule defining the responsibilities of the seller in situations where the purchaser is required to deliver an MPU to the seller but fails to.

Amend Section 312 to add Subsection (E)

ISSUE

1. Should the agreement be amended:
 - A. to allow sellers to collect and remit applicable taxes when the purchaser does not provide an MPU, but does provide sufficient information to the seller?
 - B. to allow such collection authority to be at the sellers discretion or allow sellers the option of not collecting any tax when they don't receive an MPU or sourcing information from the purchaser?

Issue 2 – MPU Exemption Form

When the purchaser knows that the software will be used in more than one jurisdiction, Section 312 mandates the delivery of a MPU and shifts the burden for all taxability determinations to the purchaser. If the seller does not receive an MPU and otherwise does not know that the software will be used in multiple jurisdictions, the general sourcing hierarchy of Section 310(A) comes into play thus sourcing the sale to a single location.

Issue 2A. If the purchaser does not provide an MPU, should sellers be authorized to collect and remit tax based on information provided by the purchaser?

Issue 2B. If the seller is allowed to use information provided by the purchaser to collect and remit the tax without an MPU, is this authority optional or a requirement? Should the seller be allowed the option of not imposing any tax if they do not get an MPU and have information indicating that the software and related services will be used in more than one location?

Industry comments: Section 312 is silent with respect to the obligations of the seller and the purchaser in situations where the purchaser is required, but fails or refuses to deliver to the seller an MPU exemption form. Whenever the purchaser knows that the product or service will be used in more than one jurisdiction, it is the purchaser that is in possession of the information needed to collect and remit the applicable tax. However, many times, the seller will be in possession of similar information.

Industry proposes amending Section 312 to add a new subsection E as follows.

- E. If an MPU Exemption Form is not delivered to the seller by the purchaser, the seller:
 - 1) may use written information obtained from the purchaser at the time of consummation of the sale which will support any reasonable but consistent and uniform method to collect and remit the applicable tax, or may collect the tax according to Section 310(A);
 - 2) in the absence of information from the purchaser and in the absence of the seller's bad faith, is relieved of any obligation to collect or remit tax on that transaction. The purchaser is solely responsible for the tax.

Amend Section 312 to add Subsection (E)

The industry's proposal would give the seller the option to undertake the purchaser's obligation to remit the applicable tax on the transaction. Many times, a purchaser does not have the administrative resources to undertake the complex tax calculation and reporting duties that come with allocating a transaction to multiple jurisdictions. The seller might have sufficient resources and can undertake to fulfill these obligations on the purchaser's behalf. The industry proposal gives the seller the flexibility to accommodate the purchaser in this circumstance. The proposal also has features that give the purchaser the appropriate incentives to either provide the seller with the MPU or the information necessary for the seller to collect and remit the applicable tax, but not to force on an unwilling seller to undertake this obligation.

The preferred scenario is that the purchaser will fulfill its obligation to provide the seller with the MPU form. However, in some situations, the seller may be willing to undertake the purchaser's obligation to remit the correct amount of tax to the applicable jurisdictions. This scenario contemplates that the seller will have received sufficient information from the purchaser to accurately collect and remit the tax to the appropriate jurisdictions. Proposed Section 312(E)(1) would permit the seller, at its option, to undertake this obligation and use the information received from the purchaser to make the apportionment. The proposed new section also makes it clear that if the seller is unwilling to apportion, the seller retains the option to source the transaction under Section 310(A).

Proposed Section 312(E)(2) contemplates the scenario where both the buyer and the seller know that the product or service which is the object of the transaction will be used in more than one jurisdiction, but the purchaser refuses to provide an MPU and does not provide the seller with information which would enable the seller to collect and remit the applicable tax. Under this scenario, the seller would be exempt from collecting or remitting any tax with respect to the transaction. Exempting the seller from tax collection under this narrow circumstance puts the seller in the same position it would have been in had the purchaser fulfilled its obligation to give the seller an MPU. The obligation to remit the applicable tax with respect to the transaction would remain with the purchaser where it belongs.

Discussion items for Project:

Issue 2A. Consider allowing the seller to source the transactions based on information provided by the purchaser in the absence of an MPU, because it would get us closer to the ideal of destination sourcing. The Direct Mail Sourcing Rules in Section 313 could be used as a model for possible sourcing of computer software and related services.

Issue 2B. If the project is inclined to allow the seller to source the transactions based on information from the purchaser as described in Issue 2A, following are options to consider for sourcing.

When the seller has information in their business records that an MPU should have been provided by the purchaser:

- allow the seller the option to collect and remit the applicable tax based on written information obtained from the purchaser. If specific information is not provided by the purchaser the seller is relieved of the obligation to collect tax.
- allow the seller the option to collect and remit the applicable tax based on written information obtained from the purchaser. If specific information is not provided by the purchaser the seller must collect tax according to section 310(A).

Proposal 5**Exhibit 2**

Amend Section 312 to add Subsection (E)

- require the seller to collect and remit the applicable tax based on written information obtained from the purchaser. If specific information is not provided by the purchaser the seller must collect and remit tax based on information that they maintain in their business records.
- require the seller to collect and remit the applicable tax based on written information obtained from the purchaser. If information is not provided by the purchaser, require the seller to collect the tax according to Section 310(A).
- relieve the seller of the obligation to collect, pay or remit tax. Make it explicit in the rule that the purchaser remains liable for the tax due.

Note – If any of these rules are adopted language would need to be added that the state reserves the right to go back and demand a correctly completed MPU from the purchaser.

Amend Section 312 to add Subsection (E)

Appendix

In April 2000 Paull Mines provided the Sourcing Work Group with a copy of the Final Report of the Situs and Sourcing Subcommittee of the National Tax Association Communications and Electronic Commerce Tax Project issued April 10, 1988. According to the report, the purpose of the Subcommittee was to examine the issues involved in the situs of a sale in electronic commerce and sourcing that sale to the appropriate jurisdiction for tax purposes and to recommend a solution to those issues for transactions in electronic commerce. The Subcommittee consisted of Karen Boucher, Wally Hellerstein, Paull Mines, Andy Ottinger, Bruce Reid, Jim Schroeder, Peter Weiss and Harley Duncan, Chairman.

Of special interest in the topic discussed in this paper was the following section on “Information Used in Multiple Locations”

Information Used in Multiple Locations

One characteristic of electronic information services that complicates sales tax administration is that a single sale or delivery of a service or data base can be used by multiple persons in multiple locations. This occurs when a service or data base is sold and delivered to a customer and subsequently made accessible to multiple employees of that purchaser through a “client-server” or “intranet” arrangement. This also occurs when a single subscription to an electronic data base is sold to a subscriber and the data base is subject to access by multiple users from multiple locations over the Internet. Similarly, a program might be sold by delivery of a “master disk” from which the buyer makes individual disks for use by its employees in different locations.

The question then becomes how should this sale, which is subject to multiple users in multiple locations, be sourced for tax purposes. The Subcommittee recommends the tax on such sales should be apportioned among the state in which the users are present according to some reasonable, supportable basis. The Subcommittee further believes that the information required for such apportionment is likely to be available during the normal course of the business transaction or can reasonable be obtained during the transaction. In addition, the Subcommittee believes that an expanded use of the direct pay concept can facilitate compliance with its recommendation that the information services should be proportionately taxable where it is used.

Proposal. The proposal of the Subcommittee for dealing the sales of information services involving multiple users in multiple locations follows.

Identifying Sales for Multiple Points of Use. If the purchaser knows at the time of sale of a service or intangible property by electronic commerce that the product being purchased will be used in more than one State (“sale of multiple points of use”) then the purchaser must complete, under normal penalties for veracity, and deliver to the seller at or before the sale the uniform disclosure of sale for multiple points of use form (“UDSMPU form”). The UDSMPU form will disclose, among other things, the States in which the electronic product will be used, extent of such use, and data then known that will allow the tax base of the sale for multiple use to be apportioned among the States of use on a uniform and consistent basis. In determining the extent of use in the various states, the purchaser may use any reasonable method for allocation that is supported at the time of sale by business records.